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Supreme Court, U.S.

FILED

JAN 28 1993

No. 92-1123

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,

—v.—

U.S. PHILIPS CORPORATION, NORTH AMERICAN PHILIPS
CORPORATION, N.V. PHILIPS GLOEILAMPENFABRIEKEN and
WINDMERE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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January 28, 1993

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

1. Did the Court of Appeals hold correctly that Petitioner, a non-party, had no standing to oppose the parties' joint motion to vacate the judgments below?
2. Did the Court of Appeals abuse its discretion in vacating the district court's judgments after it carefully weighed all the facts before it?

STATEMENT PURSUANT TO RULE 29.1

The parents, subsidiaries and affiliates of Respondents U.S. Philips Corporation, North American Philips Corporation and N.V. Philips Gloeilampenfabrieken, other than those that are wholly owned, are listed below:

Philips Electronics N.V.
 Associated Radio Finance (Australia) Limited
 Electric Lamp Manufacturers (Australia) Pty Ltd.
 Lamp Partnership Agreement
 Medical Applications Pty Limited
 Vox Limited
 Bangladesh Electrical Industries Limited
 ACEC Lighting
 Hepta
 European Development Centre
 Hypervision Interactive Multimedia Productions
 Philips and NCT noise cancellation
 DIP Networks International
 International Creative Digital Image
 Pastel
 Cable and Wire Assemblies
 CWA Immobilien
 Devlonics Philips System Integrators
 Europese Mij voor Fabricage en Verkoop van
 Gloeilampenonderdelen "E.M.G.O."
 Philips Coordination Center
 Philips Matsushita Battery Corporation
 Telecity CD-I
 Unicar Travels S.A.
 Vermont S.A.
 Bang & Olufsen A/S
 Leasing og Handelsaktiengesellschaft
 Bankgesellschaft Heinrich Behncke GmbH
 BTS-Broadcast Television Systems GmbH
 Polygram GmbH

Polygram S.A.
 Polygram Leisure Ltd.
 Euroventures Deutschland GmbH & Co. KG
 Grundig Aktiengesellschaft
 Grundig Verwaltungs-GmbH
 Norddeutsche Seekabelwerke AG
 Philips Kommunikations Industrie Aktiengesellschaft
 Philips Mietsystem GmbH
 Philips and Acustar Autoelectronics GmbH & Co. KG
 Philips and Acustar Autoelectronics Verwaltungs-GmbH
 RKS Kabel-Fernsehen Service GmbH & Co. KG
 PMA Professional Medical Accessories Vertriebs GmbH
 Kabel-Fernsehen Hamburg Service Beteiligungs GmbH
 Kabeltrommel GmbH & Co. KG
 Kabeltrommel Gesellschaft mbH
 Tellus Grundstücksverwaltungs-GmbH
 Fonobras-Distribuidora Fonografica Brasileira Ltda.
 Peterco do Nordeste Produtos Electricos S.A.
 Modu-Tronics Inc.
 Beijing Philips Audio/Video Corporation
 Car Audio Electronics (China) Company Limited
 Hua Fei Colour Display Systems Company, Ltd.
 Shenzhen Shen Fei Laser Optical Systems Company, Ltd.
 The Sino-Dutch International Engineering Company Ltd.
 Yangtze Optical Fibre and Cable Company, Ltd.
 Shenzhen Shen Fei Plastics and Metalware Company Ltd.
 Philips Semiconductor Corporation of Shanghai
 Industria Andina de Iluminacion
 Industrias Centrales del Acero S.A. - "Induacero S.A."
 El Nasr Company for Electrical and Electronic Apparatus (NEEASAA)
 Philippine Glass Bulbs, Inc.
 COGEDEP, Compagnie Generale Europeene de Distribution et d'Edition Phonographique S.A.
 Compagnie Philips Eclairage
 La Radiotechnique
 Communication-Développement

Euro-CD Management
 Société Industrielle Lenzi
 Philips Electronique Grand Public
 Citecable S.A.
 Laura Hallyday Productions S.A.
 S.A. d'Etudes et Realisations Nucleaires - S.O.D.E.R.N.
 Self Music S.A.
 Service S.A.
 Sois Villes Lumieres
 TRT - Telecommunications Radioelectriques et
 Telephoniques
 Polygram Records Ltd.
 Records Manufacturers (Ghana) Ltd.
 Car Audio Electronics (Hong Kong) Limited
 Cinepoly Records Co. Ltd.
 Electronic Devices Limited
 P&M Properties Ltd.
 Appliances Service Company Limited
 Silicon & Software Systems
 Pye (Ireland) Limited
 Stromsay Ltd.
 Hind Lamps Ltd.
 Music India Ltd.
 Peico Electronics & Electricals Limited
 Punjab Anand Lamp Industries Ltd.
 P.T. Philips Development Corporation
 P.T. Philips-Ralin Electronics
 Daco Ltd. (Private Joint Stock Company)
 Iranian Lamps Ltd. (Private Joint Stock Company)
 Radioelectric Iran Ltd. (Public Joint Stock Company)
 Optical Media Storage SpA
 Euroventures Holding Srl
 CD Factor Srl
 Idesit SpA
 Istud SpA
 Phidia Srl
 Villa Sistemi Medicali Srl

Alfautomazione Srl
 Seifra Coop Srl
 Chapulin Edizioni Musicali Srl
 Denshi Media Services Company Limited
 Japan Interactive Media Inc.
 K.K. Keystone
 Kondo Sylvania K.K.
 Marantz Japan, Inc.
 Matsushita Electronics Corporation
 Nihon Tecnico K.K.
 Nippon Phonogram Co. Ltd.
 Philips Sensor Technology Corp.
 PNN Corporation
 Polydor K.K.
 Red Bus Enterprise Inc.
 Sanken-Airpax Co. Ltd.
 Takahashi Kogei Co. Ltd.
 Your Records K.K.
 Philips Consumer Products Yugoslavia Trade Company with
 limited liability
 Light Incorporated and Trading S.A.L.
 European Silicon Structures S.A.
 Binafon Telecommunications Sdn. Berhad
 Electronic Systems (Malaysia) Sdn. Bhd.
 Malaysian Lamps Sendirian Berhad
 Maltronics Sendirian Berhad
 Philips Sound Systems (M) Sdn. Bhd.
 Philips and JVC Video Malaysia Sdn. Nhd.
 Manufacture Nationale pour la Refrigeration et
 L'Electronique "MANAR"
 Maroc Lumiere Industrie S.A.
 Societe Anonyme Marocaine de Telecommunications
 "SAMTEL"
 Compania de Vidrio Industrial, S.A. de C.V.
 Compania Mexicana de Componentes, S.A. de C.V.
 Telecomunicaciones y Sistemas Profesionales, S.A.
 de C.V.

Art Data Institute B.V.
 ASM Lithography B.V.
 Bank Mendes Gans N.V.
 B.V. Grammoservice, Distributiemaatschappij voor
 Grammofoonplaten
 Circle Information Systems B.V.
 Micro Scope B.V.
 Advanced Metal Forming B.V.
 Asemco Nederland B.V.
 BSO Beheer B.V.
 Escon B.V.
 IDL Design B.V.
 Levego B.V.
 Nederlandse Machinefabriek Alkmaar Holding B.V.
 Nieuw Rotterdam Beheer N.V.
 Noble Europe B.V.
 Medical Trading Company (Metracom) B.V.
 Solar Electric Power and Lighting Company B.V.
 European Geographic Technologies B.V.
 IGA/Instituut voor Gemeentelijke Automatisering B.V.
 Verspaning en Plaatwerk Holding B.V.
 Intervest B.V.
 Phonosongs (V.O.F.)
 Polygram N.V.
 Polysongs (V.O.F.)
 Record Service Benelux (V.O.F.)
 Wisselsongs (V.O.F.)
 Amalgamated Finance Ltd.
 Fluorescent Lamp Partnership
 New Zealand Electric Lamp Manufacturers Ltd.
 Associated Electronic Products (Nigeria) Limited
 Polygram Records Ltd.
 Philips Kommunikationssysteme und Elektro-
 installationen Gesellschaft mbH
 "Philips" Mietfinanzierungs-GmbH
 Telekabel-Fernsehnitz Graz Betriebsgesellschaft mbH
 Telekabel-Fernsehnitz Klagenfurt Betriebsgesellschaft mbH

Telekabel-Fernsehnitz Region Baden Betriebsgesellschaft
 mbH
 Telekabel-Fernsehnitz Wiener Neustadt/Neunkirchen
 Betriebsgesellschaft mbH
 Telekabel Wien Gesellschaft mbH
 Philips Electrical Industries of Pakistan Limited
 Philips Lighting Poland
 Electro Valvula S.A.
 Industria Electronica de Comunicaciones S.A.
 Compania General Espanola de Electricidad
 Taiwan Lighting Industries Co., Ltd.
 Taiwan Semiconductor Manufacturing Company Limited
 Philips Lighting Taiwan, Ltd.
 Electrical Lamp Manufacturers Thailand Limited
 Windmill Company Ltd.
 Avex A.S.
 Societe Tunisienne d'Eclairage
 Systel
 Birlesik Aydinlatma Sanayi ve Ticaret A.S.
 Turk Philips Aydinlatma Sanayi ve Ticaret Anonim Sirketi
 Turk Philips Sanayi Anonim Sirketi "Philisan"
 Estas EV Cinazlari Sanayi ve Ticaret A/S
 Turk Philips Ticaret Anonim Sirketi
 Alto Music Ltd.
 Cedarwood Music Ltd.
 Channel 5 Video Distribution Ltd.
 Debonaire Music Ltd.
 D2B Systems Company Limited
 Maxwell Multi Media Limited
 Spin U.K. Limited
 Crompton Parkinson (Lighting) Ltd.
 European Cables Ltd.
 F.F.R.R. Music Ltd.
 F.F.R.R. Records Ltd.
 Go Discs Ltd.
 Gralto Music Ltd.
 Kempston (1987) Ltd.

Pageant Music Ltd.
 Paragon Publicity & Public Relations Ltd.
 Philips Lighting Manufacturing Ltd.
 Spencer Davis Music Ltd.
 Tiger Music Ltd.
 Validfirst Limited
 Consolidated Cable Investments (Pty) Ltd.
 PEC Investments (Proprietary) Limited
 Philips Electronics Holding Limited
 Philips Electronics (South Africa) (Proprietary) Limited
 South African Philips (Pty) Limited
 Swiss Office Machinery Company (Pty) Ltd.
 Daishin and Philips Lighting Autolmaps Co., Ltd.
 A.P. Radio, Goteborg
 Grammo Rack Service AB
 Dick James Music AG
 Discorack AG
 Fasselac AG
 Flammesco AG
 Glühlampenfabrik Gloria AG
 Studer and Philips CD Systems AG
 Laser Magnetic Storage International Company
 Philips and Du Pont Optical Company
 Polygram Music Publishing Inc.
 Polygram Songs Inc.
 Polygram Tunes Inc.
 The Educational Video Group Inc.
 Blockbuster Entertainment Corp.
 Whittle Communications
 Fonobras-Distribuidora Fonographica Brasileira Ltd.
 COGEDEP, Compagnie Generale Europeenede
 Distribution et d'Édition Phonographiques S.A.
 Self Music S.A.
 Cinepoly Records Co., Ltd.
 Music India Ltd.
 Chapulin Edizioni Musical, S.r.l.
 K.K. Keystone

Polydor K.K.
 Your Records K.K.
 Polygram N.V.
 Record Service Benelux (V.O.F.)
 Adrawing Ltd.
 Alto Music Ltd.
 Cedarwood Music Ltd.
 Debonaire Music Ltd.
 F.F.R.R. Music Ltd.
 F.F.R.R. Records Ltd.
 Go! Discs Ltd.
 Gralto Music Ltd.
 Pageant Music Ltd.
 Paragon Publicity & Public Relations Ltd.
 Spencer Davis Music Ltd.
 Tiger Music Ltd.
 Grammo Rack Service AB
 Discotack-Nco A.G.
 PEC Musiikkitukku OY
 Remark Records S.a.r.l.
 Remark Music S.a.r.l.
 Midi Minuit S.A.
 Euromusique S.A.
 GMT Productions S.A.
 Oui-FMC S.A.
 NOE Productions S.a.r.l.
 R. Film S.a.r.l.
 Ryan Jones S.a.r.l.
 Pan Européenne de Diffusion Cinématographique S.A.
 Kalssik Radio GmbH & Co. KG
 Klassik Radio Geschäftsführung GmbH
 IPS Records Ltd.
 Irish Record Factors Ltd.
 Polymond S.p.A.
 K.K. Japan Record Sales Network
 Melsat Inc.
 Sirius Music Publishing K.K.

Japan Phonograph Record Diffusion K.K.
 Video Pack Nippon Co., Ltd.
 FM Tokyo K.K.
 Tokyo Denka Co., Ltd.
 Satellite Digital Audio Broadcasting Co.
 News Record K.K.
 K.K. Kitty Music
 Music Service Oslo A/S
 Plateselskapet A/S
 Trutons Music (partnership)
 Teal Record Company (Proprietary) Limited
 Polygram Records Ltd.
 Eurogram S.A.
 Total Distribucion S.A.
 Edificios Balcon S.A.
 Virgin Sonet Försäljnings AB
 Stockholm Records AB
 Arigram Record Service AB
 Stockholm Music AB
 Decca Records Taiwan Ltd.
 The Video Label (limited partnership)
 M&G Records Ltd.
 Big Life Records Ltd.
 WTTV Limited
 Eros Music Systems Ltd.
 Morrison Hotel Music Limited
 DEF American Limited
 Partizan Limited
 Really Useful Holdings Limited
 Gee Street Music Limited
 Gee Street Records Limited
 Consortium for independent Broadcasting Limited
 Working Title Group Limited
 Working Title (Developments) Limited
 Big Picture Productions Limited
 Dominic Music Limited
 Metropolitan Entertainment Co., Inc.

Interscope Holding Corporation
 Gramercy Pictures J/V
 London Records (general partnership)
 London Music (general partnership)
 London Publishing (general partnership)
 Songs of London (general partnership)
 Great Entertainment Merchandise, Inc.

The parents, subsidiaries and affiliates of Respondent Windmere Corporation, other than those that are wholly owned, are listed below:

Durable Electrical Metal Factory, Ltd.
 Durable Belson Manufactory, Ltd.
 Topfair Trading Company, Ltd.
 Tower Switches, Ltd.
 Tower-Norstat, Ltd.
 Paragon Industries
 Parawind Limited
 Win-Tron Electronics, Ltd.

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APPENDIX:

Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) and (c) From Orders Certified by the United States District Court for the Northern District of Illinois, <i>U.S. Philips Corp. v. Sears</i> , dated November 16, 1992	A1
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,

v.

U.S. PHILIPS CORPORATION, NORTH AMERICAN
PHILIPS CORPORATION, N.V. PHILIPS
GLOEILAMPENFABRIEKEN and WINDMERE
CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Respondents U.S. Philips Corporation, North American Philips Corporation, N.V. Philips Gloeilampenfabrieken (collectively, "Philips") and Windmere Corporation ("Windmere"), which together constitute all parties to the judgments at issue, respectfully request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit be denied.

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

Contrary to the claims made in the Petition, this Petition involves the interpretation of 28 U.S.C. § 2106 (1982), which states:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Petitioner was not a party to the claims or judgments at issue, the subsequent appeal, or the settlement that resolved this entire dispute and rendered the appeal moot. Nor is Petitioner a party to the unfair competition claims presently pending in Illinois. Because of Petitioner's tactical decision to appear only after settlement mooted the appeal (Petition ("Pet.") at A3-5)¹, and its attenuated connection to the judgments at issue, the Court of Appeals ruled that Petitioner did not have standing to oppose the parties' joint motion to vacate the district court's judgments (Pet. at A5). Petitioner has not sought certiorari regarding that determination or leave of this Court to intervene, and, therefore, has no standing to seek certiorari on the question presented.

Respondents also disagree with Petitioner's factual statement of the case, insofar as is material to disposition of the Petition, in the following particulars:

1. There was no "active and substantial involvement" (Pet. at 4) by Petitioner below. Before the district court, Petitioner denied that it was a party and did not appear by counsel at the trial (Pet. at A3). Before the Court of Appeals, Petitioner filed no notice of appearance or brief, its

¹ Citations preceded by "Pet. at A" are to the Appendix to the Petition; citations preceded by letter designation are to the appendices to this Joint Brief of Respondents in Opposition.

prior counsel identified Windmere as the only "real party in interest," and Petitioner first sought to intervene only after all parties had settled all outstanding claims (Pet. at A2-4). Petitioner's alleged payment of Windmere's defense costs hardly constitutes "active and substantial involvement."

2. As the Court of Appeals noted, but as the Petition obscures,² Petitioner is not the party in Illinois that is attempting to use collaterally the unfair competition judgment vacated below. In the Illinois action, Philips sued Sears Roebuck & Co. ("Sears"), not Petitioner, for unfair competition, and it was Sears, not Petitioner, who asserted collateral estoppel (Pet. at A4). Thus, Petitioner is not only a stranger to the judgments at issue here, but it also is not the party that is attempting to use one of those judgments collaterally.

3. Although Petitioner mentions that the Court of Appeals, pursuant to 28 U.S.C. § 1292(b), has agreed to decide whether the vacated judgment has any collateral estoppel effect against Philips (Pet. at 5 n.5), the Petition treats the issue as if it already had been settled: "[t]his practice [of vacating judgments] permits unsuccessful litigants to avoid the preclusive affects [sic] of final judgments" (Pet. at 6). The Petition thus bases its primary argument concerning the need for review on the alleged resolution of an issue yet to be decided. Moreover, in its joint brief to the Court of Appeals, dated November 16, 1992, Petitioner and Sears made the opposite argument: "collateral estoppel continues to apply in the circumstances presented here" (A3).

² Petitioner alleges "Philips brought a similar action for patent infringement and unfair competition against Izumi and another of its distributors, Sears" (Pet. at 3), but neglects to disclose that the unfair competition claim was asserted only against Sears.

SUMMARY OF ARGUMENT

Petitioner was not a party to either the proceedings below or the attempt to use one of the vacated judgments collaterally, and the Court of Appeals determined that Petitioner "does not have standing" (Pet. at A5). Under settled precedent, Petitioner may seek review of the question it presents only by petitioning for a writ of certiorari on the standing issue or by moving to intervene before this Court. Petitioner has done neither. Petitioner may not ignore this settled procedure before seeking review.

The question presented is in any event patently unworthy of the Court's review. The decision below is completely fact-bound and settled no important issue having wide applicability to other litigants. The decision is also in full accord with both this Court's decisions and the power vested in appellate courts to "vacate . . . any judgment . . . as may be just under the circumstances." 28 U.S.C. § 2106 (1982).

ARGUMENT

I.

PETITIONER LACKS STANDING.

After examining, *inter alia*, Petitioner's relationship to the claims at issue here and those in Illinois, Petitioner's prior denial of its status as a party, and its delay in seeking to intervene until after the parties' settlement mooted the appeal, the Court of Appeals determined that Petitioner lacked standing to oppose the parties' joint motion to vacate the judgments (Pet. A3-5).³ Thus, Petitioner could seek review either by petitioning for certiorari on the standing

³ As this Court has held, "the application [to intervene] must be 'timely.' If it is untimely, intervention must be denied." *NAACP v. New York*, 413 U.S. 345, 365 (1973).

issue, *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965), or by moving to intervene for the purposes of filing its petition. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), *cert. granted*, 389 U.S. 813 (1967); Robert L. Stern et al., *Supreme Court Practice* 46-47, 340 (6th ed. 1986) (discussing *Banks*).

Petitioner followed neither course, ignored the determination below, and simply filed the petition as if it were a party to the appeal. While Petitioner cites both *Scofield* and *Banks* (Pet. at 15), neither opinion supports Petitioner's decision to disregard both the determination that it lacked standing and 28 U.S.C. § 1254(1), which permits review by writ of certiorari upon the petition of any "party" to the case below. *See Karcher v. May*, 484 U.S. 72, 77 (1987) ("[W]e have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.")

Petitioner does not have standing to seek review of the question presented, and the Court lacks jurisdiction to grant the writ.

II.

THE DECISION BELOW IS FACT-BOUND AND IS IN FULL ACCORD WITH THIS COURT'S DECISIONS AND WITH 28 U.S.C. § 2106.

Respondents, the only parties to the judgments at issue, settled all disputes and exchanged general releases after the appeal had been fully briefed (Pet. at A31-35). Respondents then filed a joint motion to dismiss the appeal as moot and to vacate the district court judgments. These are precisely the facts that have repeatedly led this Court to vacate lower court judgments.

In *Continental Casualty Co. v. Fibreboard Corp.*, 113 S. Ct. 399 (1992), *City Gas Co. of Fla. v. Consolidated Gas*

Co. of Fla., 111 S. Ct. 1300 (1991) and *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985), the parties settled all disputes (B2, C3). In *Continental Casualty and City Gas*, this Court then granted the parties' joint motion to vacate the judgments below. In *Lake Coal*, the Court, apparently *sua sponte*, vacated the judgment of the court of appeals after "complete settlement of the underlying causes of action." 474 U.S. at 120. Moreover, in *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988), the respondent withdrew its claim for injunctive relief before the federal courts and, over petitioner's objection, this Court vacated that portion of the court of appeals judgment addressing the withdrawn claim, holding that

[w]hen a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

See also *Onwuasoanya v. United States*, 488 U.S. 920 (1988); *Russoniello v. Olagues*, 484 U.S. 806 (1987); *Department of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986); *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983); *Alabama v. Davis*, 446 U.S. 903, 903-04 (1980); see generally 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533.10, at 433-35 (2d ed. 1984).

These authorities make clear that the opinion below clearly does not "conflict[] with precedent of this Court" (Pet. at 12). Petitioner manufactures a conflict only by speculating about the record in *City Gas Co.*, ignoring the other authorities cited above, and misreading *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

In *Munsingwear*, this Court stated that its "established practice" in dealing with appeals that have become moot "is to reverse or vacate the judgment below." 340 U.S. at 39.

Petitioner's construction of *Munsingwear*—that judgments may be vacated only when a case becomes moot due to "happenstance" rather than the affirmative action of the parties (Pet. at 12-14)—cannot possibly be reconciled with the Court's citation of *Munsingwear* as authority for vacating judgments when an action was settled (*City Gas Co.*), or when a party mooted the appeal by withdrawing its claim (*Deakins*).

Karcher v. May, 484 U.S. 72 (1987), also does not support Petitioner's argument. In *Karcher*, an appeal was taken on behalf of a state legislature by individuals in their capacity as speaker and president. When they lost their legislative posts, their successors withdrew the appeal. The Court declined to grant the motion of the original legislators to vacate the judgment below because the appeal ended when their successors "declined to pursue" it. 484 U.S. at 83. *Karcher* simply recognized that *Munsingwear* does not apply when individuals who no longer represent a party seek vacation of a judgment. *Id.*

The decision below also reflects the broad discretion granted appellate courts under 28 U.S.C. § 2106:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment . . . as may be just under the circumstances.⁴

⁴ Although 28 U.S.C. § 2106 was neither cited to or by the Court of Appeals, respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 525 (1974) (Douglas J., dissenting) ("A respondent, however, has the right to urge any argument to support the judgment in his favor")

The Court of Appeals weighed many of the facts and circumstances of this litigation that has lasted nearly a decade, and determined that vacatur was "appropriate" (Pet. at A6). The exercise of the Court of Appeals' wide discretion presents no occasion for review by this Court.

III.

THE PETITION MISCHARACTERIZES THE OPINION BELOW: THERE IS NO IMPORTANT ISSUE OR CONFLICT AMONG THE CIRCUITS WARRANTING REVIEW.

Although Petitioner suggests that the opinion below reflects a practice of always vacating judgments upon settlement (*see, e.g.*, Pet. at 6), the Court of Appeals twice stated otherwise: "we do not hold that vacatur must always be granted" (Pet. at A6) and "we do not view vacatur as automatic" (Pet. at A5). Petitioner apparently contends that these clear pronouncements should be disregarded as superfluous: "[I]t is difficult to imagine a scenario where the Court [of Appeals] would not automatically grant vacatur following settlement" (Pet. at 5 n.4). Whatever the limits of Petitioner's imagination, the Court of Appeals must be taken at its word. The opinion clearly establishes that while "vacatur is the general rule" (Pet. at A6), the facts and circumstances of each case will be dispositive.

Only by exaggerating the breadth of the decision below can Petitioner predict dire consequences from its application: "Thus, under the Federal Circuit's practice, even though a district court may enter final judgment that a patent or trademark is invalid, full and fair competition could be inhibited by fear that such judgment can later be nullified by private agreements." (Pet. at 7). No patent or trademark was involved in the judgments vacated here, and if Petitioner is right about the "practice" of the Court of Appeals with

respect to such issues, that concern can be resolved in a case which actually raises them.

Petitioner also misapprehends the significance of *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 113 S. Ct. 52 (1992). The Court in *Cardinal* agreed to review the appellate court's vacation of a judgment of patent invalidity when affirming a judgment of noninfringement—a decision by the lower court not to address an issue the parties are actively litigating which does not affect the result. Whatever the merits of the Court's procedure in *Cardinal*, it is irrelevant here.

By mischaracterizing the opinion below and exaggerating the decisions of other courts of appeals, Petitioner manufactures "a clear-cut conflict among" the courts of appeals on an "issue of importance to the administration of justice" (Pet. at 6). While the courts of appeals clearly differ on whether the interests of the parties in vacating a judgment generally should prevail over the public interests in preserving precedents, no court has explicitly adopted an inflexible rule either that judgments may never be vacated upon settlement or that they always must be.⁵

Although Petitioner cites *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988), for the proposition that there is a "clear-cut" conflict between the decision below and decisions of the Court of Appeals for the

⁵ See *Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280, 281 (2d Cir. 1985) (court "generally follow[s] the rule that district court judgments that become moot pending appeal must be vacated"); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) (conflicting interests must be balanced in each case); *Clarendon Ltd. v. Nu-West Indus.*, 936 F.2d 127, 129 (3d Cir. 1991) ("routine[]" practice to decline to vacate).

Seventh Circuit (Pet. at 10-11), *Memorial Hospital* has recently been questioned by a panel of the Seventh Circuit as "difficult to reconcile . . . with Supreme Court precedent on the subject." *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 819 n.1 (7th Cir. 1992).

Moreover, the only question presented by Petitioner concerns the vacation of two judgments entered after a jury verdict. The Petition presents no issue regarding any other judicial act that may serve to guide other future litigants, such as the publishing of an opinion. While in the Illinois action, Sears made use of the unfair competition judgment (in arguing collateral estoppel with respect to a claim *not* brought against Petitioner), whether the vacation of that judgment has any effect in the Illinois case is precisely the issue now pending before the Court of Appeals.

There is presently no significant public interest or, indeed, any interest of Petitioner, in preserving the judgments at issue. While Petitioner would pretend to stand in the shoes of Sears, the party attempting to use the judgment collaterally in Illinois, it does not. Significantly, Sears did not attempt to intervene here or below.

The judgments vacated below concern claims asserted among respondents who have settled all their differences, executed general releases, and moved to have those judgments vacated. In granting the motion to vacate, the Court of Appeals properly balanced a number of circumstances, noting that the Philips companies, in giving up their right to appeal the judgments, "are entitled to rely on our precedent" supporting the motion to vacate (Pet. at A6). As other courts have recognized, any other result would discourage settlement on appeal of private disputes. *See, e.g., Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280, 283 (2d Cir. 1985). *See generally* 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533.10, at 432 (2d ed. 1984).

The petition presents no occasion for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 28, 1993

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

U.S. PHILIPS CORPORATION
and NORTH AMERICAN
PHILIPS CORPORATION,

*Plaintiffs-Counterdefendants-
Respondents,*

v.

SEARS ROEBUCK & CO. and
IZUMI SEIMITSU KOGYO
KABUSHIKI KAISHA,

*Defendants-Counterplaintiffs-
Petitioners.*

MISC. DOCKET NO.

PETITION FOR PERMISSION TO APPEAL
PURSUANT TO 28 U.S.C. § 1292(b) and (c)
FROM ORDERS CERTIFIED BY THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS

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Dated: November 16, 1992

B. The Issue As To Reinstatement Of N.A. Philips' Unfair Competition Claims

In its October 13, 1992 opinion, the district court determined that collateral estoppel could no longer bar N.A. Philips' unfair competition claims because the Florida judgment had been vacated. It based its reinstatement of N.A. Philips' claims on a prediction that Seventh Circuit law would never give collateral estoppel effect to a vacated judgment.¹⁶ The effect of this ruling is to give N.A. Philips a "third bite at the apple" by having the opportunity to try its unfair competition claims once again, even though two separate juries have already found against N.A. Philips on every substantive element of its claims. This would be a costly waste of judicial resources.

In *Bates v. Union Oil Co.*, 944 F.2d 647, 650-51 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1761 (1992), the Ninth Circuit held that in some circumstances, a vacated judgment *can* be given collateral estoppel effect where the judgment in the first case was vacated because of the parties' settlement. Although the Seventh Circuit has not ruled on the precise issue involved here -- whether to continue to give collateral

(Footnote continued)

(Emphasis added). Thus, only Izumi's claims against U.S. Philips would be prohibited because only U.S. Philips was an opposing party against Izumi in *Windmere*.

¹⁶ Seventh Circuit law applies to this question because the judgments which were vacated involved non-patent claims only. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1573-76 (Fed. Cir. 1984) (*per curiam*).

estoppel effect to another circuit's judgment vacated because the parties settled on appeal -- its prior case law, which unequivocally states the Seventh Circuit's opposition to vacatur,¹⁷ strongly suggests that the Seventh Circuit would adopt the *Bates* rule and hold that collateral estoppel continues to apply in the circumstances presented here.¹⁸ At a minimum, there is a substantial basis for difference of opinion on this issue.

III.

**AN INTERLOCUTORY APPEAL
MAY MATERIALLY ADVANCE
THE TERMINATION OF THIS LITIGATION**

In certifying its Orders for immediate appeal, the district court found that an immediate appeal may materially advance the termination of the litigation for two reasons. First, the district court found that because an immediate appeal "will determine with finality which claims will proceed to trial," a decision by this Court now "will avoid the potential for multiple trials at considerable expense if any of this Court's ruling[s] on the questions are found to be in error." It is precisely to avoid such wasted time and expense that the

¹⁷ See *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1300 (7th Cir. 1988).

¹⁸ The district court relied upon *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339 (7th Cir. 1991), to support its position that the Seventh Circuit would not give collateral estoppel effect to a vacated judgment. In *Pontarelli*, however, the Seventh Circuit merely held that under the full faith and credit statute, it was bound to apply Illinois state law to the question of the collateral estoppel effect of a vacated state court judgment. State law is not implicated in this case.

interlocutory appeal procedure exists. *See, e.g., United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984); *see also Shore v. Parklane Hosiery Co.*, 565 F.2d 815, 818 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979) (permitting an interlocutory appeal from an order denying summary judgment by virtue of collateral estoppel, "in the interests of avoiding a wasteful and unnecessary trial"); 16 Charles A. Wright, *et al.*, *Federal Practice and Procedures* § 3930 (1977 & Supp. 1992) (the "advance termination requirement" is satisfied when courts determine that an appeal could result in "the possibility of avoiding trial proceedings, or at least curtailing and simplifying pretrial or trial").

Second, the district court stated that resolution of these issues by this Court could potentially enhance the possibility of settlement between the parties. Numerous courts have recognized the strong judicial policy favoring the settlement of disputes and avoiding costly and time-consuming litigation. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3155 (U.S. Nov. 2, 1992); *United States v. Baus*, 834 F.2d 1114, 1127 (1st Cir. 1987); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 207 (5th Cir. 1981).

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO GRANT, VACATE AND REMAND
ON GROUNDS OF MOOTNESS

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No. 91 - 1993

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

MOTION TO GRANT, VACATE AND REMAND
 ON GROUNDS OF MOOTNESS

A petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit is currently pending in this case. The sole issue raised in that petition is the correctness of the Ninth Circuit's decision to apply Texas law in determining whether petitioner Continental Casualty was obliged to indemnify respondent Fibreboard Corp. for punitive damages awarded in one Texas civil case - *Cimino v. Raymark Indus., Inc.*, 86-0456-CA (E.D. Tex.). See pet. App. 28a (specifying the relevant rulings that the Ninth Circuit affirmed).

That issue is now moot, because of a settlement reached in *Cimino* between petitioner Continental and the plaintiffs. In that settlement, Continental agreed to make various specified payments directly to the *Cimino* plaintiffs, who

withdrew all other claims against Fibreboard and Continental. This settlement was approved on September 25, 1992. The effect of this settlement is to moot the question of Continental's liability to Fibreboard for punitive damages previously awarded in *Cimino*.

It follows that the appropriate action for this Court to take at this time would be to grant a writ of certiorari, vacate the decision below, and remand for dismissal of this case, under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). See, e.g., *City Gas Co. of Florida v. Consolidated Gas Co. of Florida, Inc.*, 111 S. Ct. 1300 (1991); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 434 n.31 (citing examples).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF
FLORIDA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT MOTION TO GRANT CERTIORARI,
VACATE JUDGMENT OF COURT OF APPEALS
AND REMAND WITH DIRECTIONS TO VACATE
JUDGMENT OF DISTRICT COURT ON
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF
 FLORIDA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE ELEVENTH CIRCUIT

JOINT MOTION TO GRANT CERTIORARI,
 VACATE JUDGMENT OF COURT OF APPEALS
 AND REMAND WITH DIRECTIONS TO VACATE
 JUDGMENT OF DISTRICT COURT ON
 GROUNDS OF MOOTNESS

The parties¹ to this proceeding jointly move the Court to grant certiorari, vacate the judgment of the Court of Appeals for the Eleventh Circuit and remand the case to the court of appeals with instructions to vacate the district court's August 14, 1987 Final Judgment and July 24, 1987 Findings

¹ The statement of City Gas Company of Florida pursuant to Supreme Court Rule 29.1 can be found at page 1, note 1 of its Petition. Pursuant to that rule, Consolidated Gas Company of Florida, Inc. states that it has no parents or subsidiaries.

of Fact and Conclusions of Law and remand for dismissal of this action with prejudice.

This case has been settled amicably by the parties and general releases have been exchanged. The parties' settlement agreement obligates respondent to file a Satisfaction of Judgment if the Final Judgment entered by the district court remains extant and prohibits respondent from initiating proceedings before the Florida Public Service Commission so as to invoke the injunctive relief granted by the district court. The case is, accordingly, moot. As this Court noted in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." See, e.g., *Onwuasoanya v. United States*, 488 U.S. 920 (1988); *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) ("When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint"); *Russoniello v. Olagues*, 484 U.S. 806 (1987); *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983); *Alabama v. Davis*, 446 U.S. 903 (1980). See generally 13A C. Wright et al., *Federal Practice and Procedure* § 3533.10 at 433-35 (1984). In accordance with this authority, the parties respectfully request that this Court grant certiorari, vacate the judgment of the court of appeals and remand the case with instructions that the court of appeals vacate the Final Judgment and Findings of Fact and Conclusions of Law entered by the district court

on the grounds of mootness and remand to the district court for dismissal with prejudice.

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